ORAL ARGUMENT NOT YET SCHEDULED

NO. 18-1187 (CONSOLIDATED WITH NO. 18-1217)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KITSAP TENANT SUPPORT SERVICES INC.,

Petitioner/Cross-Respondent,

V.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW FROM A DECISION OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR PETITIONER KITSAP TENANT SUPPORT SERVICES INC.

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November 19, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Petitioner Kitsap Tenant Support Services, Inc. certifies the following:

A. Parties.

1. Petitioner is Kitsap Tenant Support Services, Inc. ("KTSS").

2. Respondent is the National Labor Relations Board ("Board").

B. Rulings Under Review.

This case is before the Court on a petition filed by KTSS for review of an order issued by the National Labor Relations Board (Board Case Nos. 19-CA-074715, 19-CA-079006, 19-CA-082869, 19-CA-086006, 19-CA-088935, 19-CA-088938, 19-CA-090108, 19-CA-096118, and 19-CA-099659) on May 31, 2018, and reported at 366 NLRB No. 98. On August 8, 2018 the Board filed a petition to enforce the order. On August 8, 2018, the Court consolidated 18-1187 and 18-1217 as cross-appeals. (Doc. 1744654).

C. Related Cases.

Petitioner's counsel are unaware of any related cases either pending or about to be presented to this or any other court.

D. Amici Curie and Intervenors

There are no amici curie or intervenors.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Petitioner makes the following disclosures:

1. The Petitioner Kitsap Tenant Support Services Inc. is a corporation organized under the laws of the State of Washington. Kitsap Tenant Support Services Inc. has no other parent corporations, and no other publicly-held company has a 10% or greater ownership interest in Kitsap Tenant Support Services Inc.
2. Kitsap Tenant Support Services Inc. provides habilitative services to developmentally disabled individuals in Bremerton and Port Angeles, on the Olympic peninsula in the State of Washington.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

United States Code

Revised Code of Washington

Other Authorities

GLOSSARY

Board or NLRB	National Labor Relations Board
Act	National Labor Relations Act
KTSS	Kitsap Tenant Support Services
ALJ	Administrative Law Judge
CP	Community Protection
State	State of Washington
DSHS	Department of Social and Health Services
Union	AFSME – American Federation of State, County and Municipal Workers

I. JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Kitsap Tenant Support Services, Inc. ("KTSS") to review, and cross-application of the National Labor Relations Board ("Board") to enforce, an order issued against KTSS on May 31, 2018 and reported at 366 NLRB No. 98.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)) ("the Act"). Because the Decision and Order, 366 NLRB No. 98 (May 31, 2018), is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), the Court has jurisdiction over KTSS' petition and the Board's cross-application.

II. STATEMENT OF THE ISSUES

1. Was Acting General Counsel Griffin's ratification of the complaint brought by then General Counsel Solomon, who was improperly appointed under the Federal Vacancies Reform Act, valid when Griffin made only conclusory pronouncements that he had "appropriately reviewed" the case?
2. Did the NLRB err by deciding that Kitsap Tenant Support Services failed to bargain in good faith in violation of Section 8(a)(5) when the evidence showed (1) KTSS met with the union fourteen (14) times over a period of eighteen months (including meetings with a FMCS mediator); and (2)

reached agreements on all but six proposals, each of which was a mandatory subject of bargaining?

3. May the NLRB order an employer to bargain with the union a minimum of fifteen (15) hours per week when the Act requires only that the parties meet at reasonable times and reasonable intervals?
4. Did the NLRB err in finding KTSS unlawfully terminated employee Bonnie Minor when the evidence showed that Ms. Minor falsely told a vulnerable developmentally disabled female client who had a history of sexual abuse and exploitation that Alan Frey had screamed at, yelled at, and been mean to her (Minor) when Mr. Frey had worked long and hard to gain the trust of the client and the expert opinion presented indicated that someone who made such a statement and admittedly lied to a developmentally disabled client should not work in the industry?
5. Did the NLRB err when it found employees Sale and Gates were unlawfully terminated when they had failed and refused to take a severely developmentally disabled man who was confined to a wheelchair to the hospital when he requested they do so and when they failed and refused to repair a wheelchair that had caused an abrasion to the client's leg?
6. Did the NLRB err by finding that KTSS had unlawfully disciplined and then demoted employee Lisa Hennings when the record demonstrates a long

history of Henning's' short comings and KTSS' unsuccessful attempts to work with her to correct her performance?

7. Did the NLRB ignore Section 10(c) of the Act which prohibits a make whole remedy when the discipline imposed by an employee is for cause?
8. Is deference appropriately afforded to the NLRB?
9. Is a twelve month extension of the certification year appropriate when the parties met and bargained, including through FMCS mediation, and reached agreements on all but six proposals?
10. Did the NLRB err in finding that KTSS unlawfully declined to provide financial information regarding state reimbursement when KTSS never asserted an inability to pay?
11. Did the NLRB err in finding the employer violated the Act by initiating a policy and practice of enforcing its disciplinary rules more strictly in retaliation for employee's union activity?

III. RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the attached Addendum.

IV. STATEMENT OF THE CASE

A. The Proceedings Below

Beginning on February 16, 2012 and continuing to March 4, 2013 the union filed a series of nine (9) charges against KTSS alleging violations of the Act.

General Counsel issued the initial complaint consolidating the charges on June 22, 2012 (Appx. 5). The complaint was amended on February 28, 2013 (Appx. 28); March 27, 2013 (Appx. 45) and on April 17, 2013 (Appx. 66).

On August 30, 2013 KTSS filed a motion to dismiss the second amended complaint (Appx. 74) because the complaint was not validly issued because (1) Acting General Counsel Solomon was not lawfully in office when the complaint was issued; and (2) the U.S. District Court in the Western District of Washington (Tacoma) had denied the Region's request for injunctive relief because Solomon did not lawfully hold office (Appx. 81). That motion was denied by both the Administrative Law Judge and the Board (Appx. 72; 84; 108 fn.1). A trial, lasting twenty-one days, was held before an ALJ. The decision issued on June 4, 2014 (Appx. 88). Both General Counsel and KTSS filed exceptions to the ALJ decision. On May 31, 2018 some four years later, the Board issued its decision upholding part and overturning other parts of the ALJ decision.

B. Statement of Facts

1. The Company

Kitsap Tenant Support Services Inc. is a corporation organized under the laws of the State of Washington (Appx. 89:21-22). Its corporate office is located in Bremerton, Washington, it also maintains an office in Port Angeles. (Appx. 89:34-

35). Alan Frey is KTSS Program Manager and is responsible for the day-to-day operations. (Appx. 90:21).

2. The Nature of KTSS Business

KTSS provides services to allow clients with developmental disabilities to live in the community. All clients served have an IQ of 69 or less (Appx. 654:9-21). Many also have mental health issues or physical disabilities (Appx. 654-659). Only the degree of disability varies, which dictates the type of services provided.

Services provided by KTSS include community protection, intensive tenant support, and tenant support light. The community protection services involves developmentally disabled clients with an IQ of 69 or less who have committed a sexual crime and have been found likely to do so again. See: RCW 71A.12.210. Those clients receive 24 hour a day line-of-sight monitoring as an alternative to incarceration.[1] Those clients receiving "intensive tenant support" receive 24 hour a day care; those in "tenant support light" receive varying hours of care dependent upon how well they can function on their own.

3. KTSS Source of Client Referrals and Funding

All developmentally disabled clients are referred to KTSS by the State of Washington Department of Social and Health Services. The Legislature

[1] The KTSS community protection workers were not included in the bargaining unit having been found to be "guards".

appropriates funds which are then provided to DSHS for distribution to those providing services. DSHS allocates funds into two categories, (1) administrative costs and (2) ISS. All funds allocated as ISS are required to be paid to staff. DSHS regularly audits to ensure compliance. (Appx. 616:24-619:23; 856:21-857).

4. The Negotiations

The union was certified as collective bargaining representative on March 23, 2012 (Appx. 89:38-90:1). Thereafter the parties met some fourteen times in negotiations. Negotiations included three (3) meetings with a FMCS mediator. (Appx. 1450).

The union proposed thirty articles (Appx. 977). The parties reached agreement on 28 articles (Appx. 1392). At the conclusion of the negotiations only six issues remained unresolved (Appx. 1452). Each was a mandatory subject of bargaining.

5. Bonnie Minor

In the Fall of 2011 Bonnie Minor served as the Head of Household in a Community Protection (CP) house (Appx. 238:2-15). The clients in the CP program are developmentally disabled adults who have a history of, or propensity to, engage in sexual offenses (Appx. 662; 1533; 1550).

Frey was informed by the therapist that a client Christmas party had been cancelled. The client had been informed of the cancellation by Minor (Appx.

811:20-812:22). Having no knowledge the party had been cancelled, and not having authorized a cancellation, Frey contacted Minor by telephone (Appx. 813:1-9; 818:20-22). Minor admitted that she had cancelled the party (Appx. 813:10). Ms. Minor stated the party had to be cancelled because "some of the clients did not have money" for the party (Appx. 814:1-2). Frey ordered the party be rescheduled.[2]

Frey learned that following the telephone conversation, Minor approached the three clients in the household and told them Frey had screamed and yelled at her (Minor) and he was mean to her (Appx. 820:10-16).When Frey spoke with Minor she admitted that she had done so. When asked why she had done so, she stated that she felt Frey was treating her like her father. Minor also admitted she was untruthful and that Frey had not screamed or yelled at her (Appx. 821:13-19). Minor did not deny this testimony. Frey explained to Minor she had engaged in "triangulation" which was inappropriate (Appx. 822: 1-11). Triangulation is harmful to clients and the trust that had been built over the past fifteen plus years.

One of the clients Minor admittedly lied to was a 36 year old developmentally disabled female who entered the community protection program at age 21. She had been driven across the country in a camper and repeatedly

[2] If clients did not have sufficient funds it was KTSS practice to supply the food for a holiday party. (Appx. 814:3-10).

raped, including by her father. When she entered the KTSS program the previous case manager (a male in a different program) threw her belongings out the window. She was distrustful, particularly of men. Upon entering the KTSS program there were months when she laid under her bed, scared to come out. She had a stapler and was stapling her wrist (the staples were taken away). Frey lay on the floor beside the bed to talk to her and ask what was wrong. He even used a stapler and pretended to staple his wrist, prompting her to eventually say "boy that looks pretty silly you are doing this." Over time Frey built on that relationship and gained the client's trust. The client came out from under the bed and stopped slamming doors on staff's arms and stopped running away. If the client obtained a weapon, Frey had built the trust so the client would give him the weapon (but never to another staff). (Appx. 823-825).

Frey quickly determined that Minor should be terminated because she was destroying his relationship with the client and it would cause the client to regress (Appx. 825). The decision to terminate was communicated to Minor because Frey was concerned about her returning to the household (Appx. 826:5-15).

KTSS had a policy that prohibited staff contact with clients after the employment relationship ended (Appx. 1207-1208). Minor had received that policy and agreed to abide by it (Appx. 1627). Subsequent to the termination, Minor attended a KTSS client function. A "women's group" sponsored by KTSS

met regularly and went on outings. (Appx. 827:24-828:14). KTSS staff supervised and attended such outings (Appx. 828:11-12). Minor's sister was employed by KTSS and was taking clients on an outing (Appx. 828:15-20) Minor rode with her sister and the clients and attended the outing after her termination (Appx. 828:19-20). Minor's conduct violated the policy and professional boundaries. (Appx. 828:24-829:8; 1206).

6. Alicia Sale and Hanna Gates

Ms. Sale and Ms. Gates were employed as Direct Service staff in the Intensive Tennant Support (ITS) program. Both Sale and Gates worked together.

The client who is at the center of this matter was an 84 year old male with severe cerebral palsy and developmental disabilities. He could not walk and had been wheelchair bound for years. He could not use his arms which are locked in front of him in an "x" pattern. His elbows, wrists and fingers barely moved. He required assistance in most, if not all aspects of living (Appx. 795:3, 796:4). The annual assessment and plan of care demonstrated the severe limitations and vulnerability of this client (Appx. 1599). Frey had a long term relationship with this client, having known him since 1992 as one of the first clients Frey had served.

On December 20, 2012 Sale noticed a bruise and scratch on the client. Arriving at the client's residence Frey inspected the injury and determined that the

bruise had come from the client's wheelchair during transfer of the client from bed to wheelchair and the scratch from a sharp edge of the wheelchair footrest (Appx. 798:22-799:20; 1618).[3] Frey instructed Gates and Sale to pad and tape the wheelchair (Appx. 804:9-23).[4] Frey found the client to be complaining about a stomach ache (Appx. 797:15; 837:8) and determined the client's complaint was serious.[5] The client was complaining that his stomach (belly) hurt and that he wanted to go to the doctor. (Appx. 797:15-23; 801:2-9). Frey testified that Sale stated "he [sic: the client] has been asking to go to the doctor all morning" (Appx. 801:17-22). Sale also stated that the client was always complaining to go to the doctor (Appx. 802:1-2) and explained that there was not enough staff to take the client to the doctor and that the client complained all the time. (Appx. 802:4 and 11; 1344). It was confirmed by an independent witness that these statements were made by Sale and Gates (Appx. 837:10). Both Sale and Gates stated that the client had asked to go to the doctor multiple times (Appx. 837:14-838:2). The client confirmed that he had asked to see the doctor (Appx. 801:24).

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[3] Frey sat in the wheelchair, felt sharp edges, and measured the injury and determined the location of the cause of the scratch (Appx. 799:9-800:25; 1618).

[4] The Board found the ALJ credited Frey's testimony that he instructed Sale and Gates to pad the wheelchair (Appx. 120).

[5] Frey was very familiar with the client because of a long term relationship. Frey, knowing the client liked pie asked the client if he wanted a piece of pie and the client indicated no, to Frey that showed the seriousness of the concern. (Appx. 797:16-23; 801:17-18).

Arrangements were made for the client to be taken to the doctor (Appx. 803:19; 843:11). It was determined that the client had an upper GI bleed which eventually required hospitalization (Appx. 807:11-20). The following day, Frey returned to check on the client. He found that the wheelchair had not been fixed as he had instructed. He taped the sharp edges himself using materials readily available at the residence (Appx. 805:7-21).

As a result of the failure to provide medical attention to the client and the failure to follow instructions about padding and taping the wheelchair, Sale and Gates were placed on administrative leave (Appx. 806:1; 808; 1379; 1621). Letters to Sale and Gates explained the reasons for placing them on administrative leave and sought their explanation (Appx. 1379; 1621). Sale stated the client had a belly ache but did not ask to go to the doctor, she couldn't drive the client, and she could not be held responsible for fixing the wheelchair because she went to another house (Appx. 49).

Frey considered the responses. He noted that Sale and Gates had changed their story, first acknowledging at the residence that the client had asked to go to the doctor, and then later claiming he had not (Appx. 809:3-7). Frey concluded they were not truthful (Appx. 809:19ff). The issue was not that Sale and Gates did not personally drive the client to the doctor, but that they did not arrange transportation for medical care (Appx. 803:8-16; 808:7). Both claimed there were

not enough staff to take the client to the doctor (Appx. 802:4; 837:10-11; 842:6). Alternatives were available: call the office, call a cabulance, take a taxi (Appx. 406:13-18; 802:16-803:7).[6] Gates and Sale chose to do nothing. Frey also considered the medical condition and how it was eventually determined to be a serious GI bleed which required hospitalization. (Appx. 807:11-13).[7]

He also considered that despite instructing Sale and Gates to pad and tape the wheel chair, they did not do so. Sale admitted that despite Frey's direction:

> I did not do it because I did not think it was necessary.
>
> (Appx. 444:2-4).

Both Sale and Gates were terminated (Appx. 166).

7. Lisa Hennings

Ms. Hennings began work at KTSS in 2009 as a Direct Service Staff. Approximately three (3) months later she became a Head of Household at a residence that served five clients (Appx. 318:5-16). Throughout her employment she experienced difficulties in performance. Several times she was transferred to households with fewer clients on three occasions because it would reduce the paperwork and responsibilities and allow Hennings to succeed (Appx. 897:13-

[6] Gates admitted that she previously rode with clients to go to medical appointments (Appx. 429:16-23)

[7] Such a delay in providing care was considered abuse and neglect by Department of Health Investigation (Appx 503:16-19).

900:21; 938:19-940:24). Despite this transfer and lessened responsibilities problems continued.[8] Ms. Hennings was demoted from Head of Household to Direct Service Staff (Appx. 834; 1658). Even after the demotion problems continued (Appx. 1663) until Ms. Hennings requested a transfer to the graveyard shift where there was less responsibility because the client sleeps during the night and there are no appointments scheduled (Appx. 942:5-14). Performance problems continued but after retraining Henning's performance improved (Appx. 942:15-25).

V. SUMMARY OF ARGUMENT

The Board, as it frequently does, identifies only evidence that supports its desired result, ignoring its obligation to consider and explain contrary evidence. Here it took the Board four years to do so.

As a result it placed form over substance when it found KTSS bargained in bad faith, ignoring that KTSS met 14 times with the union, including three sessions with a federal mediator and reached agreements on 28 proposals leaving only 6 issues unresolved. The resultant order of the Board was punitive and required the performance of a useless act.

[8] Details of the continuing and lasting difficulties are set forth in detail in the argument pp. 35 - 39 infra.

In addressing the 8(a)(3) allegations the Board ignored the required elements of proof, leaping over gaps in proof to reach the desired result. A make whole remedy was imposed when employees were discharged for cause, which section 10(c) of the Act forbids. Those employees' acts and omissions were detrimental to vulnerable clients which precluded a make whole remedy. The Board ignored the argument.

VI. ARGUMENT

A. The Complaint Was Invalid

Complaints are issued (most often by the Regional Director) on delegated authority of the General Counsel. 29 U.S.C. § 153(d). Here the complaint was issued on June 22, 2012. At that time Lafe Soloman had been appointed and served as Acting General Counsel.

KTSS challenged Solomon's authority to issue complaints. The basis of the challenge was that Mr. Solomon lost his authority under the Federal Vacancies reform Act of 1998, 5 U.S.C. § 3345 when he was nominated as General Counsel on July 31, 2010 and his name was submitted to Congress. Both the ALJ and Board denied the motion (Appx. 72; 84). The Board "found no merit in the argument" and rejected the argument as moot because it was ratified (Appx. 108 fn.1). The Supreme Court disagreed, concluding in agreement with this and the Ninth Circuit that Solomon lost authority after he was nominated. Because the

complaints were issued after Solomon's nomination he lacked authority and the complaints were void. *NLRB v. SW General*, _US_, 137 S.Ct. 949 (2017); *SW General v. NLRB*, 796 F.3d 67, 78 (DC Cir. 2015); *Hooks v. Kitsap Tenant Support Services*, 816 F.3d 550, 559 (9th Cir. 2016).

On September 25, 2015, following this court's decision in *SW General*, General Counsel of the NLRB Griffin[9] ratified the issuance of the complaints by Solomon. The "ratification" was issued some three years after the complaint and 15 months after the ALJ decision using the conclusory statement "after appropriate review and consultation with staff…" (Appx. 108). The question is whether Griffin's ratification was appropriate and cured the defect.

Prejudice inevitably results from the unauthorized initiation of an enforcement proceeding but after the defect in authority is cured and the proceeding authenticated by valid officers the "relevant issue is the degree of continuing prejudice…and whether that degree of prejudice – if it exists – requires dismissal." *Federal Election Commission v. Logi Tech Inc.*, 75 F.3d 704, 708 (DC Cir. 1996). In *FEC* the court upheld the ratification because the agency was presumed to have blessed both the decision and administrative process leading up to it. The court had "significant doubts" whether the *FEC* had engaged in a "real

[9] Richard Griffin was one of the Board members whose recess appointment was found unconstitutional in *Noel Canning v. NRLB*, 573 U.S. __, 134 S.Ct. 2550 (2015).

fresh deliberation." 75 F.3d at 707. This court is unable to determine whether a "real fresh determination" was actually made by Griffin other than to accept his conclusory statement that he conducted an "appropriate review" which he then asserts is "broad and unreviewable." (Appx. 108).

While prosecutorial discretion may be unreviewable under the Act, the decision to ratify a previous decision that was unlawfully initiated by an official lacking authority should require more than a self-serving conclusory statement. This court should require and expect a detailed explanation. Hopefully a "real fresh determination" would include some "common sense" by the General Counsel as suggested in *Southern New England Telephone v. NLRB,* 793 F.3d 93, 94 (DC Cir. 2015).

B. The Standard of Review

The Act states that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e). Whether they are so supported is a question of law for the court. In *Universal Camera Corp. v. NLRB* the Court recognized that Congress' intended the "substantial evidence" standard to be based on the record viewed as a "whole" and end the practice of some courts accepting as substantial evidence isolated support for Board determinations. 340 U.S. 474, 488 (1951).

Courts are to assume more responsibility to determine the reasonableness of the Board's findings. *Id*. 340 U.S. at 490.

The court will not "merely rubber-stamp NLRB decisions." *Dover Energy v. NLRB*, 818 F.3d 725, 729 (DC Cir. 2016):

> This court is a reviewing court and does not function simply as the Board's enforcement arm. It is our responsibility to examine carefully both the Board's findings and its reasoning, to assure the Board has considered the factors that are relevant to its choice of remedy…
>
> *Tradesman Int'l v. NLRB*,
> 275 F.3d 1137, 1141 (DC Cir. 2002)

A decision of the NLRB will be overturned if the Board's factual findings are not supported by substantial evidence or if the Board acted arbitrarily or otherwise erred in applying the established law to the facts. *Universal Camera*, 340 U.S. at 477; *Hawaiian Dredging v. NLRB*, 857 F.3d 877, 881 (DC Cir. 2017). An agency decision is arbitrary when it "…failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before it." *Motor Vehicles Mfrs. Assn. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Douglas Foods v. NLRB*, 251 F.3d 1056, 1062 (DC Cir. 2001). To avoid a determination that it acted arbitrarily "the Board must provide a logical explanation for what it has done." *Lee Lumber v. NLRB*, 117 F.3d 1454, 1460 (DC Cir. 1997). Where the evidence is in conflict, the substantial evidence test requires the Board "to take account of contradictory evidence"

Lakeland Bus Line v. NLRB, 347 F.3d 955, 957 (DC Cir. 2003) and explain why it rejected it. *UAW v. Pendergrass*, 878 F.2d 389, 392 (DC Cir. 1989).

This Court has also stated "our review must take into account whatever in the record fairly detracts from the weight of evidence cited by the Board to support its conclusions." *Dover Energy*, 818 F.3d at 729; *Advanced Life Systems, Inc. v. NLRB*, 898 F.3d 38, 44 (DC Cir. 2018). A reviewing court must set aside a Board decision when "it cannot conscientiously find that the evidence supporting the decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Universal Camera*, 340 U.S. at 490.

The court reviews the NLRB's application of law to the facts for reasonableness. *Southern New England Telephone v. NLRB*, 793 F.3d 93, 96 (DC Cir. 2015). The Court will uphold the Board's construction of the Act only when it is "rational and consistent with the Act…" *NLRB v. Curtin Matheson Scientific, Ins.*, 494 U.S. 775, 787 (1990). When a Board applies a result without reaching the decision by "reasoned decision making" the order is deemed arbitrary and capricious and will not be enforced. *Local Joint Executive Bd. of Las Vegas v. NLRB*, 657 F.3d 865, 872 (9th Cir. 2011); *United Food and Commercial Workers Int'l Union v. NLRB*, 880 F.2d 1422, 1435-36 (DC Cir. 1989).

C. Deference

1. Judicial deference to the NLRB is limited.

In all challenges to a Board decision the Board argues that its decision is entitled to deference. The deferential standard applies **only** when the process by which the Board reaches a result is logical and rational and has engaged in reasoned decision making. *Fred Meyer Stores Inc. v. NLRB,* 865 F.3d 630, 638 (DC Cir. 2017).

> Judicial deference is not warranted where the Board fails to adequately explain its reasoning, [or] where the Board leaves critical gaps in its reasoning.
>
> *Saxe Productions LLC v. NLRB*
> 888 F.3d 1305, 1311 (DC Cir. 2018)

This court "cannot defer to a Board that has not adequately considered the issues raised by the parties." *Fred Meyer*, 865 F.3d at 639.

Under *Chevron*, a court will defer to an agency's interpretation of a statute if the statute is ambiguous and the agency's interpretation is reasonable. *See Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). The viability of *Chevron* deference has been called into question, and its application has been limited in recent opinions by Justices Gorsuch and (then Judge) Kavanaugh. *See e.g. Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1630 (2018) (if the canons of statutory construction supply the answer to an ambiguity, *Chevron* deference is not due); *Loving v. I.R.S.*, 742 F.3d 1013, 1016 (D.C. Cir. 2014) (to determine whether a statute is ambiguous and "whether the agency's interpretation

is permissible… we must employ all the tools of statutory interpretation, including text, structure, purpose, and legislative history.")

If the Board's decision is not based on an ambiguous statute, and the Court is in the best position to resolve any arguable ambiguity. The Board is not entitled to *Chevron* deference.

D. The analysis utilized: Wright Line

The Act operates upon the presumption that a discharge was lawful until proven otherwise. *NLRB v. Burnup & Sims Inc.*, 379 US 21, 23 n.3 (1964). General Counsel carries the burden to establish a violation of the Act. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983); *Fred Meyer Stores*, 865 F.3d at 637. When the employer claims to have discharged an employee for a reason other than the employee's protected activity the Board applies the "Wright Line Test." *Transportation Mgmt. Corp*, 462 U.S. at 401-03; *Hawaiian Dredging*, 857 F.3d at 882.

General Counsel bears the initial burden to establish a "prima facie" showing sufficient to support an inference that protected conduct was a motivating factor in the employer's decision to take adverse action. *Hawaiian Dredging*, 857 F.3d at 882; *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228 (DC Cir. 1995). To establish a prima facie case the General Counsel must prove (1) the existence of protected activity; (2) the employer's knowledge of such activity; (3) evidence of

union animus; and (4) the line between protected activity and the adverse employment action (nexus). *Earthgrains Co.*, 338 NLRB 845, 849 (2003).[10] If General Counsel proves each element, the burden shifts to the employer to show that it would have taken the same action absent the protected conduct. *Hawaii Dredging*, 857 F.3d at 882; *Earthgrains*, 338 NLRB at 849.

"Evidence of an employer's good faith belief that an employee engaged in misconduct suffices to establish a defense to a claim, even if the belief is erroneous." *Hawaiian Dredging*, 857 F.3d at 885; *Sutter East Bay Hosp. v. NLRB*, 687, F.3d 424, 435-36 (DC Cir. 2012).

E. There is no evidence of anti-union animus

An employer does not violate sections 8(a)(1) or (3) unless its action is motivated by an anti-union animus. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963); *Int'l Brotherhood of Boilermakers v. NLRB*, 858 F.2d 756. 761 (DC Cir. 1988). While never clearly defined, anti-union animus is the term for anti-union sentiments that affect management actions and result in union organizers, members and representatives being harassed. *Glossary of Labor and Technical Terminology Univ. Hawaii.*

[10] The failure to prove any essential element is fatal and requires dismissal. *Anderson v. Liberty Lobby*, 477 US 242, 250 (1986); *Talavara v. Shah*, 638 F.3d 303, 308 (DC Cir. 2011).

Here no evidence was presented to demonstrate KTSS had an anti-union animus. To the contrary the evidence showed:

- The employer held meetings with employees. No evidence was presented to show what was said during those meetings or what position the employer took as to the organizing and union (Appx. 255-257;724).

- When asked about the content of the meeting an employee (Minor) testified "…it wasn't anti-union" (Appx. 253:15).

- No anti-union or oppositional statements attributable to management or supervisors were presented.

- Lisa Hennings openly supported the union. Her picture was on a flyer showing union support (Appx. 1596). She served on the negotiating committee. When asked if she was being "targeted" by her employer she said "no". (Appx. 362:22).

- Jack Hopkins claimed to be the instigator of union activity (Appx. 275; 632:8-10) and identified himself as an open union activist. (Appx. 635:5 and 18). No adverse action was taken against him and he retired. (Appx. 1640).

The Board is required to identify contrary evidence and explain why it rejected it. *Lakeland Bus Line*, 347 F.3d at 962; *Pendergrass*, 878 F.2d at 392. Here it did not do so. The bare conclusion that there was anti-union animus is insufficient.

F. Minor

1. The prima facie case was not established.

General Counsel established that Minor engaged in protected activity, her picture appeared in a flyer that supported the union which was distributed on

December 14 (Appx. 257:6-8; 1596) and she attended a union meeting on December 7 (Appx. 253:14). Adverse action was also established, she was terminated on December 7 (Appx. 257:19). However the remaining elements of the Wright Line standard – animus, knowledge and nexus were not proven and the Board's consideration of the evidence in finding Section 8(a)(3) and (1) violations failed to adequately address the evidence before it.

a. Knowledge of protected activity was lacking.

Evidence that KTSS knew of Minor's protected activity was non-existent. Although Minor's picture appeared on a union flyer (Appx. 1596) the flyer was not distributed until December 14 and KTSS was not aware of the flyer until mid-December, several weeks following the decision to terminate. The appearance on the flyer could not have been a factor in the decision. Although Minor attended a union meeting after work on December 6 (Appx. 257:6-8) there was no evidence presented that KTSS was aware of the meeting or of her attendance. No evidence supports the element that KTSS knew of the protected activity.

b. There is no evidence of anti-union animus.

As discussed above (pp 21-22) there is no evidence of the required element of anti-union animus. The Board is not permitted to speculate but must confine the decision to evidence before it. The Board "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that

the evidence fairly demands." *Allentown Mack Sales v. NLRB*, 522 U.S. 359, 378 (1988); *Sutter East Bay Hospital*, 687 F.3d at 437. Here no inference can be drawn of the employer's knowledge of Minor's protected activity because the record lacks any evidence. The element was not proven.

c. Nexus.

Another required element is nexus, a connection or causal link between protected activity and the adverse action. Without proof of employer knowledge of protected activity and no proof of union animus a nexus cannot be established. The Board is not entitled to speculate, but must confine itself to the evidence presented. Lacking such evidence the necessary element was not proven and the prima facie case fails. Thus as a result of the failure of proof of three of the elements of the prima facie case, there was no evidence upon which the Board could have based its decision and finding that the termination of Minor violated the Act.

2. KTSS Met the burden of establishing that it would have taken the same action.

Assuming the prima facie case was made (which it was not) KTSS met its burden to show that it would have taken the same action to terminate Minor. It is important to look at what Minor did. First, she cancelled a Christmas party for the developmentally disabled clients without consultation or approval of management. Second, and most importantly, she lied to a developmentally disabled client, telling the client that Frey had screamed and yelled at her and was mean to her (Appx.

820:10-16). Minor admitted that she had told that to the clients and that it was not true (Appx. 821:13-19). Frey determined that Minor should be terminated because he was concerned about her returning to the household (Appx. 826:5-15). Minor received the call when she was attending the union meeting.[11]

Minor's actions were clearly and unmistakably wrong and harmful to the vulnerable clients. It destroyed trust Mr. Frey had built with the client over fifteen years. The significance of what Minor did was underscored by the testimony of Michael Comte, an expert in treating those with developmental disabilities. When presented a hypothetical with these facts, Mr. Comte found the client would have "massive trust issues" and what had been accomplished by Mr. Frey showed "a significant sign of progress" with the client (Appx. 682:22-683:25). When asked if it would be good for a client if a staff member lied, and told the client that the male supervisor had been mean to the staff and yelled at her Comte unequivocally said:

> Oh, my God, that would be disastrous…
> (Appx. 684:4)
>
> …to sabotage [the trust] is unconscionable
> (Appx. 684:13)
>
> To have someone perpetuate the post-traumatic stress symptoms that this woman [sic: client] has is incredible
> (Appx. 684:18-20)

[11] The Board statement that Minor received the call following the union meeting (Appx. 118) is incorrect; Minor testified the call was received during the meeting (Appx. 257:13).

> I hope that is truly a hypothetical and not a real situation, because if it is, she [sic: the staff] should not be working with a person with disabilities.
>
> (Appx. 684:21-23)

Comte's testimony was unchallenged and unrebutted. Minor's conduct was clearly inappropriate, inexcusable, and detrimental to the vulnerable developmentally disabled clients.

KTSS met its burden when it established a good faith belief that an employee engaged in misconduct. *Hawaiian Dredging*, 857 F.3d at 885; *Sutter East Bay Hosp.*, 687 F.3d at 435-36 (an employer who holds a good faith belief that an employee engaged in the misconduct in question has met its burden under *Wright Line*). Here KTSS established not only a good faith belief, it established that the extremely inappropriate and detrimental conduct actually occurred (Minor admitted it occurred).

3. Evidence does not rebut the employer's reason.

The Board relied upon various matters to find the KTSS' reason was a pretext. First, it relies upon timing. However as noted above, there is no evidence presented to show the employer was aware of any protected activity. Second, it relies upon a positive performance evaluation. Even though there was a positive performance evaluation, the horrible conduct in which Minor engaged trumped the evaluation, she engaged in conduct that demonstrated a disregard for the clients that was detrimental to their welfare. Next, the Board faults KTSS for not utilizing

a lesser form of discipline. The Board is not here to substitute its judgment for that of the employer, especially in matters where it has no meaningful experience involving developmentally disabled clients. It must be remembered that expert Comte testified that a person who did what Minor did "should not be working with persons with disabilities" (Appx. 684:12-25). The Board also relied upon the "extensive 8(a)(5) violations" including failure to bargain in good faith (Appx. 119). However, if they occurred at all, it was long after the decision to terminate Minor and were significantly different. The Board heaped everything and anything on the pile to justify its decision. The decision was clearly wrong.

4. Minor's conduct after termination violated company rules, was detrimental to the clients and precludes reinstatement and back pay.

KTSS policy prohibited staff contact with clients after the employment relationship ended (Appx. 1207-1208). Minor had received those policies and had agreed to abide by them (Appx. 1627). Subsequent to the termination, Ms. Minor attended a client function (see pp.8-9 supra). This violated the policy and professional boundaries (Appx. 828:24-829:8; 1206). Rules limiting contact between staff and clients to work only assigned hours are important for the client development and well-being (Appx. 668:13-669:6).

Minor's subsequent breach of the employment terms – having contact with clients outside of her work precludes reinstatement. *John Cuemo Inc.*, 298 NLRB 856 (1990). The Board arbitrarily failed to address this issue.

5. Back pay cannot be ordered when the discipline is imposed for "cause" §10(c).

Although the Board possesses a certain latitude in fashioning remedies for unfair labor practices, the discretion is not absolute. The Board is bound by restrictions that limit remedial authority.

An employee discharged or disciplined for misconduct is not entitled to reinstatement or back pay, even though the employee's Section 7 rights may have been violated by the employer. This principle is embodied in Section 10(c) of the Act:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or payment to him of any back pay, if such individual was suspended or discharged for cause.
>
> 29 U.S.C. § 160(c)

The legislative history of that provision indicates that it was designed to preclude the Board from ordering back pay or reinstating an individual who had been discharged because of misconduct. The House Report states that the provision was:

> Intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct.

> *H.R.Rep.No.* 245, 80th Cong., 1st Sess., 42 (1947).

The Conference Report notes that under § 10(c):

> employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause *** will not be entitled to reinstatement'.
>
> H.R.Conf.Rep.No.510, 80th Cong., 1st Sess., 55 (1947), U.S. Code Congressional Service 1947, p. 1161.

When an employee is discharged or suspended for cause, the Board is precluded from imposing a make whole remedy. *Fiberboard Corp. v. NLRB*, 379 U.S. 203, 217 (1964).

An example of the application of that provision is found where an employee took confidential information from his employer's private files. The Fifth Circuit found that was unprotected activity:

> Even if the employee was discharged for engaging in protected activity when he discussed confidential wage information with other employees, he forfeited his remedial rights under the National Labor Relations Act by taking confidential wage information from the company files…
>
> *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 364 (5th Cir. 1990).

The Board denied reinstatement under similar circumstances *Uniform Rental Svc.*, 161 NLRB 187, 190 (1966) and when an employee lied to collect unemployment benefits *Vilter Mfg. Co.*, 271 NLRB 1544 (1988).

Even if the Board had authority to grant a make whole remedy, compelling policy considerations preclude the Board from doing so. Employees who engage in misconduct and who receive the appropriate discipline for that misconduct should not benefit from that misconduct through a windfall award of reinstatement and back pay.

Minor was clearly terminated for cause. This issue was raised before the Board, and the Board ignored the argument. The Act was never intended to afford special protection to employees who engaged in such egregious and detrimental behavior. The Board's finding that the termination of Minor violated the Act and imposition of a make whole remedy must be reversed.

6. Questions of unfitness for duty preclude reinstatement.

The Ninth Circuit and Fourth Circuit held an employee should not be reinstated even when that employee was *unlawfully discharged*, if that employee is unfit for employment "in a sensitive position affecting health care." *N.L.R.B. v. Western Clinical Laboratory, Inc.*, 571 F.2d 457, 460 (9th Cir. 1978). As the court explained:

> Both the Board and [the court] must be very hesitant to compel reinstatement of an illegally discharged employee if the credited evidence leaves substantial doubt that the employee is competent to perform his job when his work directly affects the health and safety of the persons whom his employer serves.
>
> *Id.* at 461.

See also: *NLRB v. Huntington Hospital*, 550 F.2d 921, 924-25 (4th Cir. 1977).

Minor's termination was based upon significant issues of the employee's ability to provide adequate care for the vulnerable developmentally disabled clients. These are fragile persons with IQs of 69 or less and often with physical disabilities and mental health issues. The expert Comte stated (without opposition or challenge) that if a person engaged in such conduct they should not be working with the developmentally disabled (Appx. 684:21-23). Once again, the Board arbitrarily ignored this argument.

The evidence precludes reinstatement.

G. Sale and Gates

1. Wright Line analysis: The prima facie case.

Both Sale's and Gates' union activity was limited. Sale had signed a union authorization card in the Fall of 2011 when a union representative came to her house (Appx. 396:10-17). There is no evidence that KTSS was aware of her union activity or that she engaged in any other protected activity. Gates signed an authorization card outside a client's house while on duty (Appx. 451:1-14). No evidence shows that KTSS was aware that she signed a card. Gate's picture appeared on the union flyer; Sale's picture did not (Appx. 1596). The required element of knowledge was not shown as to Sale. Adverse action was shown, Sale and Gates were placed on administrative leave and subsequently terminated.

However the required elements of knowledge (as to Sale), animus and nexus (for both) were not established.

Assuming that a prima facie case was established, which it was not, KTSS met its burden under *Wright Line* when it established a good faith belief that Sale and Gates engaged in misconduct. *Hawaiian Dredging*, 857 F.3d at 885; *Sutter East Bay Hospital*, 687 F.3d at 435-36. Here KTSS established (1) Sale and Gates were instructed to repair and pad the wheelchair that caused the abrasion to the clients leg but did not do so.[12] (2) The severely disabled client had asked to see a doctor or go to the hospital[13] and Sale and Gates did not do so; (3) Frey determined that Sale and Gates lied, first admitting at the client residence that the client requested to go to the hospital[14] and later denying it; and (4) Frey's perception was that neither Sale or Gates were apologetic nor realized the magnitude of the omissions (Appx. 809:1-9)("if one of the ladies had said "boy, we should have

[12] The Board found the ALJ credited Frey's testimony that he instructed Sale and Gates to do so. (Appx. 120).

[13] Sale and Gates admission that the client requested to go to the hospital was confirmed by another employee (Appx. 836:10).

[14] The client's request and condition was serious and resulted in discovery of an upper GI bleed that required hospitalization. (Appx. 807:11-20).

called the doctor," I might have felt a little bit better…").[15] This is what resulted in the termination.[16]

Evidence of a good faith belief sufficed to establish a defense even if the belief is erroneous. *Hawaiian Dredging*, *supra*; *Sutter East Bay Hosp.*, *supra*. "The good-faith belief demonstrates that the employer would have acted the same even absent the unlawful motive." *Sutter East Bay Hosp.*, 687 F.3d at 434. KTSS met its burden under *Wright Line*. The reasons upon which KTSS acted were serious. The omissions of Sale and Gates were detrimental to the client. Frey believes Sale and Gates were untruthful having changed their stories and unrepentant.

2. The attempt to show disparate treatment fails.

The Board then looked at what it believed was disparate treatment of Sale and Gates to demonstrate the employer's articulated reason was pretextual (Appx. 121). The Board relied upon two incidents to find disparate treatment and an inference of unlawful motivation (Appx. 121). To be valid, comparators must be similarly situated in all materials aspects *Coleman v. Donahoe*, 667 F.3d 835, 847

[15] Frey testified that acknowledgment of an error, omission or wrongdoing was an important aspect of determining whether or not to terminate (Appx. 834:11-835:2).

[16] The Board tried to fault KTSS for not waiting until the DSHS investigation was completed, calling KTSS' actions "hasty" (Appx. 121). There is no requirement that DSHS complete an investigation before KTSS can act. The investigator thought the client would be a difficult witness and did not issue a finding (Appx. 175).

(DC Cir. 2012); *Burley v. Nat'l Passenger Rail Corp.*, 801 F.3d 290, 301 (DC Cir. 2015). Here it is telling that the Board stated that the comparators committed "…comparable, if not lesser, incidents of patient neglect and mistreatment" (Appx. 121) thus recognizing the comparators were not valid. Additionally the two incidents differ significantly in that the client Sale and Gates dealt with had a serious medical problem (upper GI bleed) requiring hospitalization which jeopardized the clients life.

3. Unfitness for duty precludes reinstatement.

As argued above (pp.30), if an employee is unfit for employment "in a sensitive position affecting health care" the employee should not be reinstated even if unlawfully discharged. *Western Clinical Lab*, 571 F.2d at 460. Here there is no question that the circumstances show an unfitness. We have a vulnerable developmentally disabled man, with an IQ of 69 or less, severely disabled suffering from cerebral palsy that had left him wheelchair bound with his arms locked in an "x" pattern. His fingers, wrists, elbows barely moved. He required assistance with most, if not all aspects of daily living. Despite Sale acknowledging that "he has been asking to go to the doctor all morning (Appx. 801:17-22) and both Sale and Gates stating the client asked to go to the doctor multiple times (Appx. 837:14-838:2) they did not take any step to comply with the client's wishes

to see a doctor. As it turned out, the client suffered an upper GI bleed and had to be hospitalized (Appx. 807:11-20).

The failure to accede to the vulnerable client's request demonstrated an unfitness that precludes reinstatement. The Board's failure to address this issue underscores the arbitrariness of the Board decision.

4. 10(c)

As with Minor, the Board arbitrarily refused to address the issue arising under Section 10(c) of the Act (see pp 28-31 *supra*).

When an employee is discharged or suspended for cause, the Board is precluded from imposing a make whole remedy. *Fiberboard Corp.*, 379 US at 217.

H. Hennings

1. Hennings employment history.

It is important to consider Ms. Henning's extensive employment history and how KTSS sought to worked to allow her to be successful. She began employment in 2009 as a direct service staff, in 2009 she became head of household for 5 clients.

November 7, 2011 Transfer

Ms. Hennings was transferred between client residences. The reasons for the transfer included

- Being "too touchy" with clients;

- Missed client medical appointments (prompting a DSHS investigation);
- Failure to communicate effectively regarding rides for clients;
- Numerous medication errors.

(Appx. 667:3-15; 929:6-930:5; 1641)

The transfer was from a house with five (5) clients to a house with four (4) clients (Appx. 897:13-900:21; 938:19-940:24). It was seen as a method to reduce the paperwork and responsibilities and to allow Hennings to succeed. This occurred prior to the appearance of the union.

January 23, 2012

A DSHS case manager raised questions about missed medical appointments. **Ms. Hennings admitted to missed medical appointments, including a missed surgery for a client.** Ms. Hennings was given instructions as to proper procedures.

(Appx. 1643)

February 2, 2012
A physician declined to see a client further because of four missed appointments for which Hennings was responsible.

(Appx. 1644)

March 16, 2012
Reprimand – loaned money to clients in violation of company policy and the standard of care.

(Appx. 1650)

April 12, 2012
Ms. Hennings **admitted** being late for a scheduled shift.

(Appx. 1646)

April 23, 2012
Inconsistencies in Hennings care were noted. They include:

- Outdated medications;

- Erroneous medication counts;
- Medication errors;
- Failure to complete documents;
- Med sheets completed in advance;
- Narcotic counts completed in advance;
- Financial inconsistencies;
- Incomplete paperwork.

(Appx. 1647)

April 25, 2012
House check by quality control showed significant errors.

(Appx. 1649)

August 15, 2012 Letter of Direction

- Inadequate narratives;
- Medication charting inadequate.

(Appx. 1651)

October 11, 2012 – Letter of Direction Regarding Financials
Hennings attempted to cover for her sister (Hennings gave false statements) who had "loaned" a client money, which was against policy.

(Appx. 831:22-833:14)

August 20, 2012 – Warning: Failed To Work Assigned Shift
Hennings left her scheduled shift and clients to help her daughter who had locked keys in her car.

(Appx. 1653)

January 8, 2013 – Letter of Direction
Hennings stayed after her scheduled shift, her relief was her sister. Hennings had instructed her sister to obtain Hennings personal prescription at a pharmacy which caused the sister to be late. Hennings remained after the end of her shift to perform work she had not performed during the shift.

(Appx. 1655, 1657, 1658)

> **February 6, 2013**
> Demotion from HOH to Direct Service Staff; lengthy narrative of reasons.
> (Appx. 1658)
>
> **May 21, 2013 – Written Warning Regarding Narratives – Financials**
> Ms. Hennings admitted to not using client money correctly. At Hennings request she was transferred to the graveyard shift.
> (Appx. 1663)

Hennings was transferred to a house with five clients to one with four clients to a house, then to three clients and then to one with only two clients to reduce her responsibilities to allow her to succeed (Appx. 897:13-900:21)(938:19-940:24). However, problems continued (Appx. 941:4ff), Hennings missed client medical appointments despite there being overlap staff (Appx. 904:18-905:17) and missed rides for clients (Appx. 906:6-12). The difficulties continued until it was determined that it was not appropriate to continue Hennings in the role of HOH (Appx. 1658). Frey was concerned about her caregiving and training, completing necessary paperwork, narratives, leaving clients unattended and not calling the office which was set forth in detail in the memo to Hennings (Appx. 934, 1658).[17] Even after the demotion problems continued (Appx. 1663) until Ms. Hennings requested transfer to the graveyard shift where there was far less responsibility

[17] Johnnie Driskell experienced difficulties in performance of her HOH position. She was disciplined and demoted (Appx. 1638, 1639). Neither the General Counsel or Board found that to violate the Act.

because the client sleeps during the night; and no medical appointments are scheduled (Appx. 942:5-14).

The record shows a lengthy history of difficulty in the workplace. That record predates any union activity. Although an open union supporter, Ms. Hennings testified she was not targeted by her employer (Appx. 362:22).

2. The ULPs

a. The prima facie case lacked substantial evidence

Hennings engaged in protected activity in her support for the union and participation in union activities and KTSS knew of Henning's union support. What is lacking in the prima facie case is a showing of union animus and nexus. The Board incorrectly presumed that the employer's knowledge of union activity equates to and established an anti-union animus. The *Wright Line* analysis requires more, an additional element to mere knowledge. There must be proof that the employer "knew of the employee's union activity and acted in response to it." *Advanced Life Systems*, 898 F.3d at 48 (and cases cited therein). Such proof is an "essential predicate" to the claims. *Id*. at 47. Substantial evidence of discriminatory motive must exist, but is missing here. First, the Board did not mention, let alone explain the evidence that discussed at pp 21-22 *supra*, that shows a lack of anti-union animus. Second, although the evidence showed the employer was aware of Henning's union activity, there is nothing presented in that evidence which shows

a hostility to Hennings, or any employee, because of union support or participation. Hennings acknowledged that she was not targeted because of her union support (Appx. 362:22). Mere knowledge does not equate to anti-union animus. Finally finding anti-union animus out of thin air is not appropriate and does not support substantial evidence. Proof of this essential element fails. Without proof of anti-union animus, proof of nexus must also fail.

Further, proof of adverse action is lacking in the two instances in which a letter of direction was issued. A letter of direction was not disciplinary in nature. Instead it sought to identify a problem and provide guidance to the employee. It was not considered disciplinary (Appx. 145:11-146:10; 149-150). Adverse action has been defined as:

> A materially adverse action in the workplace involves a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Such actions demonstrate an objectively tangible harm.
>
> *Bridgforth v. Jewell*,
> 721 F.3d 661, 663 (DC Cir. 2013)

Here adverse action was not established.

The Board's determination that the letters of direction issued on August 10 and August 15 violated § 8(a)(3) are not supported by substantial evidence, the elements of anti-union animus, adverse action, and nexus are lacking.

b. April 1 warning lateness

Hennings attended a union meeting on April 12. She lingered at the union meeting and admittedly arrived at work seven minutes late (Appx. 328:18; 330:8-10). At the time she was late, Hennings reported only that "she was at a meeting of a personal nature" (Appx. 1345). It was only during the hearing that she revealed it was a union meeting (Appx. 328:23). She did not call scheduling as required (Appx. 330:10). KTSS issued a written warning because Hennings was late (Appx. 1345). There was no dispute that Hennings was late. Late is late absent an exigent circumstance. Attendance at a union meeting is not an exigent circumstance. Arriving late at a scheduled shift results in staff having to remain at work and incur extra costs.

The Board has recently determined that in situations involving non-verbal misconduct that is part of the "res gestae" of an employee's protected concerted activity it will balance employee's right to engage in such activity, against the employer's right to maintain order and respect. *KHRG Employer LLC*, 366 NLRB No. 22 (Feb. 28, 2018). Attendance at the union meeting was not the basis for the warning. It was Henning's choice to linger at that meeting despite the obligation to report for work. That disregard of her obligation results in her loss of any claim of

protected activity. Henning's choice to linger at the union meeting does not excuse her tardiness.[18]

The Board relies upon discipline imposed in 2005, 2006, and 2007 to show disparate treatment (Appx. 126). However the use of discipline that occurred some six years before is an inappropriate comparator, being too distant in time. Borrowing from discrimination cases, it must be shown that the comparator was similarly situated in all material aspects – had the same job duties, discipline and the same supervisor, similarity of offense, subject to the same standard and there were no distinguishing or mitigating circumstances. *Coleman*, 667 F.3d at 847; *Burley*, 801 F.2d at 301. Here such a showing was lacking. The most telling problem is that the Board relied on matters occurring 6, 5, and 4 years before, but ignored the contemporaneous case involving Johnnie Driskell. Driskell was a union supporter (Appx. 299:5-19; 300:5-16). On June 4, 2012 Driskell participated in union "bargaining training" from 10:00-4:00 (Appx. 301:18; 302:9). Driskell lingered to talk with others at the union meeting and arriving at work at least 15 minutes late (TR 410:14-22). This resulted in additional cost to KTSS in overtime having to be paid to the staff who remained at work past her scheduled time (Appx. 303:18-21). KTSS was not aware of Driskell's participation in the union meeting

[18] In *KHRG* the Board disregarded both the *Wright Line* analysis and *Atlantic Steel* analysis as "ill suited" or "inapplicable".

or union support (Appx. 967 – "KTSS was not aware of the date of which the union intended to train employees). Late was late.

The appropriate comparator (Driskell) shows a consistent application. The Board inappropriately failed to consider this evidence.

c. The demotion.

The Board found the demotion of Hennings violated the Act, asserting that the decision included incidents that violated the Act (Appx. 127). The February 6, 2013 letter informing Hennings of the reason for demotion was five (5) pages long and provided a detailed history of Hennings' shortcomings. The details provided demonstrated continuing negligence regarding client care that were clearly detrimental (Appx. 1658). There was no rebuttal to any of the specific incidents. It is incredible that the Board would suggest reinstating this employee with this history. Such a reinstatement would clearly be against the clients' interest[19] and allows Hennings a windfall from her poor performance and lack of judgment.

The evidence demonstrates "cause" for the demotion. Section 10(c) precludes reinstatement and back pay. The record also shows that Hennings was unfit for employment "in a sensitive position affecting health care." *Western*

[19] It is interesting that the Board recognized that KTSS worked with employee Martell and terminated him when he could not perform acceptably (Appx. 122-124). Strangely, the lengthy but unsuccessful history of working with Hennings was disregarded by the Board.

Clinical Lab., supra. This record precludes a make whole remedy. The Board failed to consider or address these arguments and as a result the Board's decision fails.

I. The Duty to Bargain

Section 8 of the Act requires an employer to bargain with the union representing its employees with respect to "wages, hours, and other terms and conditions of employment" 29 U.S.C. § 158(a), (d). The parties have the obligation to "meet at reasonable times and confer in good faith." *Id.* Although the duty to bargain requires good faith, it does not "compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d).

"The Act establishes and protects the employee's right to bargain, but does not guarantee a bargain." *Int'l Broth. of Boilermakers*, 858 F.2d at 763. The Act "does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak." *HK Porter Co. Inc. v. NLRB*, 397 US 99, 109 (1970).

Either party to a collective bargaining agreement may lawfully insist to the point of impasse upon any provision related to a mandatory subject of bargaining. *Mail Contractors of America v. NLRB*, 514 F.3d 27, 31 (DC Cir. 2008). An employer may even insist upon a provision granting it discretion unilaterally to change certain conditions of employment during the term of the contract. *NLRB v.*

American Nat'l Ins., 343 U.S. 395, 409 (1952); *Mail Contractors*, 514 F.3d at 31. "Adamant insistence on a bargaining position…is not in itself a refusal to bargain in good faith." *Teamsters Local 515 v. NLRB*, 906 F.2d 719, 726 (DC Cir. 1990).

1. The Board's Role

It is implicit in the structure of the Act that the Board acts only to oversee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. *HK Porter*, 397 US at 108. The Board may not "act at large in equalizing disparities of bargaining power between the employer and union." *NLRB v. Ins. Agents Int'l Union*, 361 US 477, 490 (1960).

> The Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.
>
> *American National Ins.*,
> 343 US at 404.

2. The Board Improperly sat in judgment of the Employer's bargaining proposals

The Board addresses the employer's bargaining proposals, finding they were indicative of bad faith bargaining. In doing so, the Board improperly passed judgment on the proposals and often ignored the facts and precedent.

a. Reservation of right to reduce rates paid

One proposal provided:

> [KTSS] Reserves the right to reduce rates paid if the Department of Social and Health Services reduces the benchmark rate, the legislature

> reduces funding or changes in health care laws and contributions occur.
>
> Appx. 116, 1512

The Board found fault with the proposal stating that the employer "sought to deny the union any role in determining wages and benefits (Appx. 116). What the Board failed to consider was that all of the clients KTSS served were referred by DSHS; all of the funds KTSS received for services came from DSHS; and DSHS determined the rates to be paid to providers such as KTSS and established a two part rate structure. All money allocated in the ISS rate had to be paid to employees. If there was a reduction in legislative allocation or in the DSHS ISS pass through rate, KTSS would have no choice but to reduce the rates paid. If a union did not agree to the reduction the choice would have been to cease business or file bankruptcy.

KTSS had a legitimate business reason for the proposal. The substantial evidence test requires the Board to take into account contradictory evidence and explain why it rejected it." *Lakeland Bus Line*, 347 F.3d at 962. Here it did not do so; instead, it substituted its belief for what are proper and acceptable proposals. The Board also ignored or forgot that an "employer may insist to impasse upon a provision granting it discretion unilaterally to change certain conditions of employment during the term of the collective bargaining agreement." *Amer. Natl. Ins.*, 343 US at 409 ("whether a contract should contain a clause fixing standards

for such matters…is an issue for determination across the table, not by the Board); *Mail Contractors,* 514 F.3d at 31.

The Board erred.

b. Management Rights

A company's proposal of a broad management rights clause reserving to the company, inter alia, the right to sell the company free from the liabilities of the agreement, right to discontinue operations, determine the hours per day and weeks of operation and to suspend, discharge or otherwise discipline employees "did not constitute a refusal to bargain collectively in good faith." *American Nat'l Ins.*, 343 U.S. at 409; *Int'l Woodworkers of America v. NLRB*, 458 F.2d 852, 859 (DC Cir. 1972).

KTSS proposed a management rights clause that differed little from that in *Int'l Woodworkers*, 458 F.2d at 859 n.5, reserving the same rights. Yet the Board found fault with the management rights proposal because the Board found it too broad. (Appx. 116). However, as this Circuit has noted:

> These are, of course, mandatory bargaining subjects, but that does not mean that an employer may not seek in good faith bargaining to reserve them by agreement in a management rights clause…The mere fact that a subject is an appropriate one for collective bargaining does not mean that the employer may not seek by agreement to reserve the matter to itself.
>
> Int'l Woodworkers
> 458 F.2d at 859

The Board has held that insistence on a broad management rights clause is not unlawful or evidence of bad faith bargaining. *Coastal Electric,* 311 NLRB 1126, 1127 (1993); *Logemann Brothers*, 298 NLRB 1018 (1990).

Once again the Board erred.[20]

c. At will Employment

The Board has held that an employer's insistence on "at will" employment is evidence of hard bargaining, not bad faith. *Coastal Electric*, 311 NLRB at 1127. The Board reverses that position here finding that insistence on at will employment is evidence of bad faith bargaining. The proposal is not the Board's concern but again it passes judgment on the employer proposal when it cannot do so.

d. Progressive Discipline

The Board criticizes the employer's proposal regarding progressive discipline. (Appx. 116). That proposal appropriately reserved to the employer the step to be utilized and degree of discipline to be imposed (Appx. 1072), allowing the employer flexibility to address disciplinary issues rather than a lock step procedure. Addressing an employee theft from a client calls for a different approach than an employee who is tardy. The Board may have not liked the

[20] It is noted the union agreed to the management rights proposal except ¶17 (Appx. 95:20; 1392). There is no evidence in the record that KTSS declined to consider counter proposals or deletions from the proposed management rights clause.

proposal but it was not its role to determine what was appropriate. *Amer. Nat'l Ins.*, 343 US at 404.

3. Timing and Interval Meetings

Section 8(d) requires the parties to "meet at reasonable times and confer in good faith…" 29 U.S.C. § 158(d). However, the Act does not define the term "reasonable times." The Board concluded that KTSS violated Section 8(a)(5) by "failing and refusing to meet with the union at reasonable times to engage in collective bargaining" (Appx. 113). To support that conclusion the Board found KTSS delayed setting negotiation meetings,[21] two negotiation sessions were cut short, some were postponed (by both parties). While there were delays, all such delays were occasioned by legitimate reasons: preplanned vacation (Appx. 507:20-21), summons for jury duty (Appx. 1295); physical injury (Achilles tendon repair) (Appx. 1177); DSHS audit of KTSS and the initial setting of the hearing in this matter. The Board found fault with the company but failed to address the union's delays. The October 21st meeting lasted approximately 8 hours but the parties were together only 2 hours because of union caucus (Appx. 874:7-19). The union avoided and delayed addressing some six important issues on November 15 (Appx.

[21] A three months to prepare to bargain was not an unreasonable delay. *Veritas Health v. NLRB*, 895 F.3d 69, 81 (DC Cir. 2018).

1532); and the union cancelled the February 21st negotiations because the union negotiator wanted to spend time with her children (Appx. 1298, 1299).

The negotiations were also delayed by the union negotiator Tharp's tactics. Tharp deliberately sought to disrupt and inflame the negotiations by claiming KTSS "cooked the books" (Appx. 853:14); had a "second set of books" (Appx. 854:11); "fake books" (*Id*); and "double set of books" (Appx. 854:2). Tharp made these statements in front of bargaining unit members and committee members (Appx. 853:23-25). Tharp would make movements such as stirring a bowl while laughing (Appx. 854:6-9). The union's tone was offensive and counterproductive (Appx. 854:15-18). Tharp also gave Frey an offensive letter that was personally and objectively insulting (see Appx. 861:11 ff; 1667). The union also testified before a committee of the legislature that no additional money should be allocated to KTSS. The testimony was a "slam" on how KTSS provides services and spends money (Appx. 858 ff). The union made false statements about how KTSS allocated funds (Appx. 859:16-861:51). This public sector union never understood KTSS operations (Appx. 862:6-864:6).

The record shows that the employer and union met on the following dates:

- July 13, 2012 (Appx. 208:1–2);
- August 6, 2012 (Appx. 220:1);
- September 17, 2012 (Appx. 547:18–21);
- October 16, 2012 (Appx. 550:16–17);
- November 26, 2012 (Appx. 563:8–14);

- March 11, 2013 (Appx. 623:11–12);
- March 12, 2013 (Appx. 623:13–14);
- April 4, 2013 (Appx. 623:15–16);
- April 5, 2013 (Appx. 623:17–18);
- May 17, 2013 (Appx. 623:19–23);
- August 6, 2013 (Appx. 623:24–25);
- October 21, 2013 (Appx. 874:3);
- November 15, 2013 (Appx. 875:23–25); and
- December 2, 2013 (Appx. 1450)

The Board conceded the parties met with the federal mediator three times (Appx. 112; 1450). The record shows the parties met and bargained at reasonable times and intervals.

What is more important than the frequency and intervals is what was accomplished during those negotiations. The Board chose to ignore those facts. This was a first contract. The record shows the parties reached agreement on the following issues:

Preamble	Savings Clause and Entire Agreement
Purpose	Drug and Alcohol Free Workplace
Union Recognition	Employee Leave
Non-Discrimination	Holidays
Union Rights	Benefits
Hours of Work and Overtime	Time Clocks for Night Shift
Seniority	Time Clocks
Hiring	Cell Phone Use
Hiring and Appointments	Tools, Equipment and Supplies
Layoff and Recall	Employee Training and Development
Performance Evaluations	Reasonable Accommodation
Employee Files	Union – Management Committee
Employee Privacy	Transportation
Safety and Health	Employee Rights

(Appx. 1394; 1475)

What remained unresolved despite the parties' efforts and that of the federal mediator were:

Union Membership	Grievance Procedure
Management Rights	Compensation
Discipline	Term of Agreement

(Appx. 1392; 1452)

Each of those issues was a mandatory subject of bargaining to which either party was entitled insist to impasse.

The Board forgot "the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position." *Amer. Nat'l Ins. Co.*, 343 US at 405. Here the Board is unable to demonstrate how meeting more frequently or for longer sessions would have changed the results of bargaining. Neither does the quantity or length of bargaining establish or equate with good faith bargaining. *American Nat'l Ins.*, 343 US at 404. "Common sense sometimes matters in resolving legal disputes". *Southern New England Telephone* , 793 F.3d at 94. Here the Board does not exhibit common sense, placing form over substance.

4. The failure to provide the union with information regarding payments from the State.

An employer is not obligated to open its financial records to a union unless the employer has claimed an inability to pay. *Caldwell Mfg. Co.*, 346 NLRB 1159,

1160 (2006); *Lakeland Bus Line*, 347 F.3d at 961. The Board conceded that KTSS "did not assert an inability to pay" (Appx. 114).

The Board attempted to circumvent this established principle by finding the union did not seek general access to the employer's records but only information regarding payments received from the State of Washington (Appx. 114). This departure from precedent was justified by asserting that where the employer adopts a bargaining position that makes certain finances relevant, the union is entitled to that information to "evaluate and verify the employer's assertions and develop its own bargaining positions" (Appx. 114). The Board relied upon KTSS' proposal that would allow it to modify compensation upon 30 days' notice of the state reduced reimbursement rate and because there was a disagreement whether current reimbursement levels would support a wage increase (Appx. 114).

The Board was incorrect. It failed to recognize that all KTSS' revenue came from DSHS. It did not consider that the DSHS set staff compensation rates, and that all increases were required to be passed on to staff. KTSS' proposal related to possible **future** action by DSHS and **did not** implicate present payments.

Thus the union was asking (and NLRB requiring) KTSS to open its books – because all its revenue was received from DSHS. In addition, the KTSS' proposal allowing it to reduce compensation if DSHS reduced reimbursement applied to a

possible future action by DSHS, not a present circumstance. The amount of funds received from the state had no bearing on that issue.

Further, the Board's justification that because there were "competing proposals regarding compensation that suggested they [sic: the parties] disagree on whether current compensation levels allowed for an increase in existing wages" (Appx. 114) does not provide a basis to require KTSS to provide information about the payments received from the state. In virtually every negotiation a union proposes a wage increase greater than the employer. There is often disagreement whether the employer is willing to pay. Such a disagreement does not compel the employer to produce any financial records. The decisions of the courts have emphasized the distinction between asserting an inability to pay which triggers the duty to disclose, and asserting a mere unwillingness to pay, which does not. *Lakeland Bus Line*, 347 F.3d at 961; *United Steelworkers v. NLRB*, 983 F.2d 240, 244 (DC Cir. 1993). A difference in proposals in which a union seeks greater wage increase is not sufficient to trigger a duty to disclose. Similarly there is no support for a union requiring an employer's income from a specific customer as opposed to all financial records. KTSS' entire income resulted from the state. The Union's request and Board's decision amounted to the requirement that KTSS open its books to the union. Such was improper. Thus the Board's decision was not supported by substantial evidence. It failed to take into account and explain

contradictory evidence or evidence from which conflicting inferences could be drawn. *Universal Camera*, 340 US at 487; *Lakeland Bus*, 347 F.3d at 962.

J. Increased Discipline

The Board found that KTSS began to document disciplinary actions more vigorously because of its employee's union activities (Appx. 128). The warnings in question involved the failure to complete narratives and medication errors. The narratives were a progress report of the developmentally disabled clients which was required by DSHS (Appx. 151-152). The medication errors involved failure to give medication or giving the wrong medication (Appx. 109). There was no argument that the warnings were not justified.

KTSS was required by DSHS to produce narratives and logs showing medication errors. Testimony showed that KTSS was facing a possible audit by DSHS which required documentation (Appx. 110) which was a non-discriminatory reason. Plus there is no dispute that employees were not completing the narratives and were making medication errors. Apparently the Board wants KTSS and the court to disregard the employees' failure to perform (Appx. 1597). There are times some employees feel the presence of a union gives them license to disregard their responsibilities. It does not. See House Reports p. 28 supra.

The vulnerable developmentally disabled clients depended upon the employee to perform their jobs properly. Those who received warnings did not.

Here the warnings resulted from the employees' failure to do their job properly and not because of union activity.

The finding of the Board was in error.

K. Remedy

Although a reviewing court must give respect to the Board's choice of remedy *NLRB v. Gissel Packing Co.*, 395 US 575, 612 n.32 (1969), it remains the court's responsibility:

> …to examine carefully both the Board's findings and its reasoning, to assure that the Board has considered the factors which are relevant to its choice of remedy, selected a course which is remedial rather than punitive, and chosen a remedy which can fairly be said to effectuate the purposes of the Act.

Peoples Gas Sys., Inc. v. NLRB, 629 F.2d 35, 42 (DC Cir. 1980). The Supreme Court has more than once indicated that the goal of the remedy is to "restore the situation, as nearly as possible to that which would have obtained, but for the illegal discrimination." *Sure-Tan Inc. v. NLRB*, 467 US 883, 900 (1984); *Phelps Dodge Corp. v. NLRB*, 313 US 177, 194 (1941). The remedy must be truly remedial and not punitive. *NLRB v. Strong*, 393 US 357, 359 (1969); *Grondorf, Field, Black Co. v. NLRB*, 107 F.3d 882, 888 (DC Cir. 1997). More particularly, a remedy "must be sufficiently tailored to expunge only the **actual**, and not merely **speculative,** consequences of the unfair labor practices." *Sure-Tan Inc.*, 467 US at 900 (emphasis added).

1. The remedy is punitive.

Here the Board required KTSS to "meet and bargain in good faith with the union" and imposed a bargaining schedule that would require KTSS to bargain "minimum of 15 hours per week" or such schedule as the union agreed. (Appx. 131). Fifteen hours each week constitutes approximately 40% of the workweek. That is an unreasonable amount of time for any company let alone a company like KTSS that employs 160 people (Appx. 147).

2. The NLRB desires to sit in judgment of bargaining proposals.

The Board also ordered that KTSS submit a "bargaining progress report" every 15 days to the Regional Office of the NLRB (Appx. 130). The ostensible reason would be that the Regional Office of the NLRB monitor negotiations. That is not the role of the NLRB. It places KTSS in an untenable situation of having the NLRB continue to judge its proposals, which is what the Board has done in this case (see: Appx. 115-117). Compliance would be dependent upon the NLRB's determination that the proposals offered were appropriate. The courts have found this to be inappropriate function for the Board.

3. Useless act.

The law looks to substance and not form and does not require performance of a useless act. *NLRB v. Die and Tool Makers Lodge 113*, 231 F.2d 298, 301 (7th Cir. 1956). Here the parties met some 14 times to negotiate a contract. Agreements

were reached on 28 articles of a contract. The parties then sought the services of FMCS, meeting with the federal mediator three times. Although mediation resulted in an agreement on one additional article, there remained some 5 issues unresolved. Each of those issues was a mandatory subject of bargaining.

It is clear the Board does not like the result, but since the disagreements were mandatory subjects of bargaining and either or both parties were entitled to insist on its position to impasse. Since the Board must craft a remedy based upon actual and not merely speculative consequences of the unfair labor practices the question becomes what else could have been achieved by further bargaining. The Board is not entitled to speculate as to what would be the result of endless meetings.

The requirement of further meetings put form over substance and required a useless act. As such the remedy is inappropriate. What the Board seeks to do is to continue the negotiations and dictate the terms of agreement. That is not the Board's role.

VII. CONCLUSION

The decision and order of the Board must be reversed.

Date: November 19, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(b) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the opening certificate, disclosure statement, tables of contents and authorities, certificates of service and compliance, statutory addendum but including footnotes) contains 12,978 words as determined by the word-counting feature of Microsoft Word.

Dated: November 19, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2018, on behalf of Petitioner Kitsap Tenant Support Services, I electronically refiled the foregoing document with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will send notification of such filing to the following counsel:

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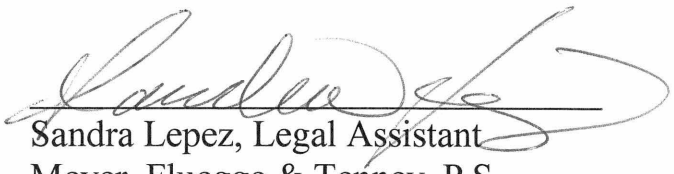
Respectfully submitted,



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STATUTORY ADDENDUM

5 U.S.C. § 3345
Acting Officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

> (1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;
>
> (2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or
>
> (3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—
>
> > (A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and
> >
> > (B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS–15 of the General Schedule.

(b)

(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)

(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

29 U.S.C. § 153
National Labor Relations Board

(a) Creation, composition, appointment, and tenure; Chairman; removal of members

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) Annual reports to Congress and the President

The Board shall at the close of each fiscal year make a report in writing to Congress and to the President summarizing significant case activities and operations for that fiscal year.

(d) General Counsel; appointment and tenure; powers and duties; vacancy

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

29 U.S.C. § 158
Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee

to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

…

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

…

29 U.S.C. § 160
Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding

shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28.

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

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(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.